No. 20620

In the

United States Court of Appeals For the Ninth Circuit

HARLOW H. OBERBILLIG, as administrator of the Estate of J. J. Oberbillig,

Appellant,

vs.

BRADLEY MINING COMPANY,

Appellee.

APPELLANT'S REPLY BRIEF

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

CLEMONS, SKILES & GREEN
Counsel for Appellant
Res: Boise, Idaho

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TABLE OF CITATIONS

TEXTS

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We submit that appellants' initial brief covers the points argued under subdivisions I, II and III of Appellee's brief. Appellant will confine this reply brief to the balance of appellee's brief.

I.

SECTION 5-203, IDAHO CODE

Section 5-203, Idaho Code, is not in point in this case. That section has to do with actions in the nature of adverse possession, or, in other words, actions wherein the right of possession is in question. This action is

based upon the contract between appellant and respondent.

In *Trask v. Success Min. Co.*, 28 Idaho 483, 155 P. 288, it was held that where the grantor conveyed land to the grantee, and the grantor stayed in possession the grantor

> "* * * will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer or a notorious assertion of right in itself would be sufficient to change the character of its possession * * *"

This is an action where appellee has held possession under a conveyance whereby it was agreed that, as consideration thereof, appellee would pay certain royalties to appellant. Appellee has had the right of possession, but its right of possession should be subservient to the rights of appellant should appellee breach the contract. It would be a strange and unrealistic rule if it was the law that a mortgagee holding a 20-year mortgage could not foreclose upon default in the 15th year for the reason that he had not held possession within 5 years.

II.

WAIVER

In *United States v. Chichester*, 9th Circuit, 312 F. 2d 275, on page 282 the court said:

> " 'Waiver' is generally defined as 'an intentional relinquishment of a known right' * * *"

and on page 283, after reviewing authorities the court held:

> "From our review of the decisions, and assuming without deciding that other elements absent from

this case need not be present, we are satisfied that as minimum requirements to constitute an implied waiver of substantial rights, the conduct relied upon must be clear, decisive and unequivocal showing a purpose to waive the legal rights involved before such conduct constitutes a waiver."

And in *Pacific States Corporation v. Hall* (CCA 9th Cal) 166 F. 2d 668 (emphasis supplied);

"The appellees rely on the fact that the statements issued by the Citizens Bank, then trustee, to appellees, did not list as due the interest herein claimed, and such statements, the appellees claim, were accepted by them as correct. *There is no evidence that appellees changed their position in any way in reliance on such statements, nor was any agreement concluded which absolved the debtor* from his liability to pay interest. The mere fact that interest was not listed in the statements, either because of some oversight or because the indebtedness at that time appeared to be far greater than the creditor could reasonably expect to recover from appellees, does not constitute a waiver of the right to claim such interest. *Thompson v. Garner*, 104 Cal. 168, 37 P. 900, 43 Am. St. Rep. 81. Appellees contend that consideration is not always a requisite for waiver, but *it is generally held that where substantial rights are involved, a waiver must be supported by a consideration to be valid.* 56 Am. Jur. Sec. 16, p. 117. At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, *there must be a clear, unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right,*

or acts amounting to an estoppel on his part. (citing cases) No such intent, or course of conduct on the part of appellant appears."

In *Union Central Life Insurance Co. v. Schulz*, 45 Idaho 185, 261 P. 235, the contention was made that as plaintiff did not exercise its option to declare the entire note and mortgage due upon the first default of payment of interest that the plaintiff waived its right. The Idaho court held this to be a continuing obligation, citing *Coeur d'Alene v. Spokane, etc. R.R. Co.*, 31 Idaho 160, 169 P. 930, and the court saying:

"The allegations of the complaint show that the appellants had made default in payment of interest installments to the prejudice of the respondent, and were continuing so to do up to the time the respondent brought the action. We conclude that the right of the respondent to exercise its option to declare the whole debt due continued as long as the default continued, and was not waived by mere delay, * * *"

It is universally held that waiver (1) is a matter of intention; (2) that the conduct evidencing such intention be inconsistent with any other theory, (3) that such conduct has induced the other to act to his trouble and expense. *Raney v. Millowners Mut. Fire Ins. Co.*, 141 Kans. 825, 44 P. 2d 285; *Universal Gas Co. v. Central Illinois Pub. Serv. Co.*, 102 F. 2d 164; *Linnard v. Sonnenschein* 94 Cal. App. 729, 272 P. 2d 315; *Phoenix Ins. Co. v. Heath* 90 Utah 187, 61 P. 2d 308, 106 A.L.R. 1391.

Appellant did nothing to convey to appellee any understanding that appellant intended to abandon its rights to the payment of royalties, which were the consideration for the transfer of the mining claims to

appellee. Appellee did not in any way change its position by reason of any act or inaction of appellant. There was no consideration to appellant to uphold a waiver of appellants substantial rights, nor did appellee incur any trouble or expense by reason of any act or inaction on the part of appellant.

In 1955, 1957, 1960 and 1963, appellee reconveyed a total of 465 claims to appellants. True, the claims so reconveyed were unpatented claims, and appellee retained the heart of the mining property, but this was the decision of appellee solely, and not at the suggestion of appellant. In other words the actions of the appellee led appellant to believe that appelle intended to, and would reconvey *all* of the mining claims to appellant. This is the reverse of appellee's claim of waiver.

III.

RES JUDICATA

Appellee cites United Mercury Mines Co. v. Bradley Mining Co., 259 F. 2d 845, and argues that as it involved the same contract and mining properties it should be considered here as res judiacta. In that case, in the first paragraph of the decision, this court said:

> "* * * This agreement covers certain mining claims in Idaho. The crux of the dispute concerns the method of computing royalties on minerals and ores extracted from mining claims * * *"

The prior action was a case determining which of several different clauses defining royalties was applicable. The cause of action in that case and the cause of action here have no relation even though they arise out of the same agreement. It is universally held that the

doctrine of res judicata applies only when the same cause of action is sought to be relitigated. *State v. California Packing Corporation* (Utah) 145 P. 2d 784; *Keidatz v. Albany* (Cal) 249 P. 2d 264; *Wilson v. Lowry* (Arizona) 52 P. 777; *Heyman Cohen & Sons v. M. Lurie Wollen Company*, 232 N.Y. 112, 133 N.E. 370.

To evade this rule, appellee argues that the complaint in the prior case could have been amended and that the doctrine of res judicata extends to all "issues" "that could have been determined if plaintiffs had sought to amend." "Issues" and causes of action are not the same. The cause of action here is foreign to the cause in the prior case.

"Amendment" relates to an issue in the same cause of action. Amendment of a pleading does not permit an entirely new cause of action.

The general rule is stated in 71 C.J.S., Pleadings, Sec. 275, p. 580:

> "The term 'amendment' as applied to pleadings has been defined as the correction of some error or mistake in a pleading already before the court. * * *"

and in 71 C.J.S., Pleadings, Sec. 290, p. 642:

> "In the absence of statutory authorization, and in many jurisdictions because of express statutory restrictions, the generally accepted rule is that an amendment may not be permitted which sets up a new and distinct cause of action, or which substantially changes the claim or demand, or cause of action, set out in the original pleadings, or which changes the issues involved in the original action."

In *Knox v. Atchison T. & S. F. Ry Co.*, (Cal) 214 P. 2d 589, it was held that amendments to conform to the

evidence should not be allowed where they raise new issues.

In *Superior Manufacturing Corporation v. Hessler Manufacturing Company*, 267 F. 2d 302, the court, said:

> "An amended pleading is one which clarifies or amplifies a cause of action which can be identified with certainty as the same cause of action originally pleaded or attempted to be pleaded. It is a perfection of an original pleading rather than the establishment of a new cause of action, and the imperfect pleading of jurisdictional facts does not deprive the court of jurisdiction as of the time the action is filed, if such defect be later corrected. * * *"

Respectfully submitted,

CLEMONS, SKILES & GREEN
By C. STANLEY SKILES
Attorneys for Appellant,
HARLOW H. OBERBILLIG,
1110 Bank of Idaho Bldg.
Boise, Idaho

CERTIFICATE

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

CLEMONS, SKILES & GREEN

By_____
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of May, 1966, I served three copies of the foregoing BRIEF OF APPELLANT upon MOFFATT, THOMAS, BARRETT & BLANTON, attorneys for appellee.

Attorney for Appellant